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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

S Development Company dba Bell Tower
Apartments; and Presidio North LP,

Plaintiffs,

v.

Commercial Industrial Building Owners
Alliance, Incorporated, a California
corporation dba CIBA Insurance Services;
Lexington Insurance Company, a Delaware
corporation; Ironshore Insurance Limited, a
foreign entity; Westchester Fire Insurance
Company, a Pennsylvania corporation;
Steadfast Insurance Company, a Delaware
corporation; Endurance American Specialty
Insurance Company, a New York
corporation; Lancashire Insurance
Company (UK) Limited, a foreign entity;
Homeland Insurance Company of New
York, a New York corporation; Landmark
American Insurance Company, a Georgia
company; et al,

Defendants.

No. CV-13-00911-PHX-GMS

ORDER

Pending before the Court is Defendant Ironshore Insurance Ltd.'s Motion to Compel Arbitration and Stay Proceedings. (Doc. 59.) For the following reasons, the Motion is granted.

BACKGROUND

Plaintiffs S Development Company, d/b/a Bell Tower Apartments, and Presidio North L.P. (collectively "Plaintiffs") own apartment buildings in Phoenix, Arizona. (Doc. 1, ¶¶ 1–2.) These properties include the Presidio North Apartments and the Bell Tower

1 Apartments. In 2006, Plaintiffs joined Defendant Commercial Industrial Building Owners
2 Alliance, Incorporated, d/b/a CIBA Insurance Services (“CIBA”), a California-based
3 insurance purchasing group that negotiates with insurance companies to issue property
4 and liability insurance policies to similarly-situated entities. (*Id.* at ¶¶ 18, 21; Doc. 70 at
5 2–3.) CIBA procures insurance for the members of the purchasing group from a number
6 of insurance companies. The named insured under the policies is CIBA and any associate
7 of CIBA to whom evidence or a certificate of insurance has been issued. While CIBA
8 itself issues Evidences of Insurance for the insured, the actual insurance policies are
9 provided by the various insurance companies, each covering a certain percentage of the
10 insured’s liability. (Doc. 66-1 at 1; Doc. 70 at 3.)

11 On March 4, 2008, CIBA issued Evidences of Property Insurance to Plaintiffs for
12 coverage effective March 31, 2008 through March 31, 2009. (Doc. 66, Ex. 4.) The
13 coverage for this time period was provided by a number of insurers that included
14 Defendant Ironshore Insurance Ltd. (“Ironshore”), a Bermuda-based foreign insurer. On
15 March 28, 2008, Ironshore issued a binding slip for its policy. (Doc. 70-2.) This slip
16 included the terms of its policy, including both a New York choice of law provision and
17 an arbitration clause. (*Id.* at 5.) On August 14, 2008, Ironshore executed the final version
18 of the policy at issue in this Motion, featuring the same terms as appeared in the slip
19 policy. (Doc. 70 at 3.) The policy provided 12.5% of a \$30,000,000 excess liability
20 policy, effective between March 31, 2008 and March 31, 2009. (*Id.*) As with any of the
21 policies purchased by CIBA, the named insured on the Ironshore policy is CIBA itself
22 and any CIBA associates who were issued an evidence or certificate of insurance. (*Id.*)
23 The policy provides retroactive coverage beginning on March 31, 2008, and features both
24 a New York choice of law provision and an arbitration clause. (*Id.*)

25 On or about May 2008 to November 2008, Plaintiffs discovered termite damage at
26 the Presidio North Apartments. (Doc. 1, ¶ 34.) On or about November 2008, Plaintiffs
27 tendered a claim for this damage to Defendants. (*Id.*, ¶ 36.) On or about November 2008,
28 Plaintiffs discovered termite damage at the Bell Tower Apartments and timely tendered a

1 claim for that damage to Defendants. (*Id.*, ¶¶ 53, 55.)

2 Plaintiffs filed the present action and their amended complaint in Maricopa
3 County Superior Court against CIBA, Ironshore, and the other insurance companies,
4 seeking declaratory relief and alleging breach of contract and breach of the implied
5 covenant of good faith and fair dealing. (Doc. 1 at 15–28.) Two of the Defendants
6 removed the action to this Court. (*Id.* at 1–7.) Defendant Ironshore now moves to stay the
7 proceedings against them and compel arbitration, pursuant to the arbitration clause in the
8 Ironshore policy. (Doc. 59.)

9 DISCUSSION

10 Ironshore asserts that this case, or at least the case against it, is governed by the
11 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the
12 “Convention”) within the Federal Arbitration Act (“FAA”). 9 U.S.C. § 201 *et seq.* The
13 Convention governs “[a]n arbitration agreement or arbitral award arising out of a legal
14 relationship, whether contractual or not, which is considered as commercial.” 9 U.S.C. §
15 202. To determine whether to enforce an arbitration agreement under the Convention, a
16 court must address four factors. These factors “require that (1) there is an agreement in
17 writing within the meaning of the Convention; (2) the agreement provides for arbitration
18 in the territory of a signatory of the Convention; (3) the agreement arises out of a legal
19 relationship, whether contractual or not, which is considered commercial; and (4) a party
20 to the agreement is not an American citizen, or that the commercial relationship has some
21 reasonable relation with one or more foreign states.” *Balen v. Holland Am. Line Inc.*, 583
22 F.3d 647, 654–55 (9th Cir. 2009) (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294–
23 95 (11th Cir. 2005)). Here, each of these four factors is met. The arbitration agreement is
24 in writing, it provides for arbitration in the United Kingdom, a signatory of the
25 Convention, it arises from a commercial legal arrangement, and Ironshore is not an
26 American citizen.

27 Plaintiffs do not address whether the agreement is governed by the Convention or
28 whether these four factors are met. Instead, Plaintiffs argue that the agreement should not

1 be enforced because (1) they did not receive notice of the arbitration clause and thus did
2 not agree to be bound by it; (2) Arizona law prohibits Ironshore from enforcing the
3 clause; and (3) enforcement of the clause is unconscionable. The Court will address each
4 of these arguments in turn.

5 **I. Whether the Clause is Unenforceable Due to Lack of Notice to Plaintiffs**

6 First, Plaintiffs argue that the arbitration clause should not be enforced because
7 they did not receive notice of the clause and thus did not agree to be bound by it. They
8 note that the Evidences of Insurance they received for the March 31, 2008 to March 31,
9 2009 coverage period mentioned neither Ironshore nor the clause, that they attempted to
10 obtain copies of the CIBA insurance plans and were unable to do so, and that the
11 Ironshore policy was not formally executed until after the coverage period began. (Doc.
12 66 at 3–6.) None of these arguments are persuasive.

13 The Evidences of Insurance Plaintiffs received for the relevant coverage period do
14 not mention Ironshore or any of the other insurance policies actually providing the CIBA
15 coverage, but instead direct the insured to “[r]efer to CIBA master policies for complete
16 terms, conditions, limitations and exclusions.” (Doc. 66–5.) Plaintiffs claim they did not
17 realize that CIBA insurance included a number of policies instead of a single plan until
18 after they initiated this action. (Doc. 66 at 2.) However, Plaintiff offers no explanation
19 why it should not be bound by CIBA’s knowledge in the purchase of the policies that
20 provided its total coverage package. To the extent that CIBA created Plaintiff’s coverage
21 by contracting with various insurers, Plaintiff is not now entitled to claim that because, as
22 CIBA’s associate, it was not familiar with the nuance of each policy that CIBA procured,
23 it is entitled to claim the coverage of each policy without being subject to the provisions
24 pursuant to which that coverage is offered. Similarly, Plaintiffs describe their difficulty
25 obtaining copies of the master insurance policies through their insurance agent and
26 CIBA, but they do not allege they actually requested any information from Ironshore or
27 suggest how CIBA and the insurance agent’s failure can or should be imputed to
28 Ironshore.

1 Further, while Ironshore's policy was not formally executed until August 14,
2 2008, after the relevant coverage period had begun on March 31, 2008, the policy was
3 executed before the Plaintiffs discovered the loss and filed the claims at issue in this case
4 in November 2008. It is also uncontested that Ironshore executed its slip policy before the
5 coverage period began and that the slip policy contained the arbitration clause and would
6 have provided coverage had there been a covered event prior to the issuance of the formal
7 policy. Thus, the Court finds that the Ironshore policy and its arbitration clause were in
8 effect prior to the loss.¹

9 **II. Whether Enforcement of the Clause is Barred by Arizona Law**

10 Next, Plaintiffs suggest that enforcement of the clause would violate Arizona law.
11 Plaintiffs first suggest that enforcement is barred by Ariz. Rev. Stat. § 20-402 because
12 Ironshore was not authorized to issue insurance in Arizona during the relevant period of
13 coverage. However, Ironshore is plainly excluded from the prohibition in that statute,
14 which states that "[t]he transaction of business in violation of [the statute] by an insurer
15 does not impair the validity of any contract of the insurer and does not prevent the insurer
16 from defending any action at law or suit in equity in any court of the state." Ariz. Rev.
17 Stat. § 20-402. Here, Plaintiffs brought this action against Ironshore and Ironshore is
18 defending itself in that action, as is permitted by the statute.

19 Next, Plaintiffs allege that Ironshore's New York choice of law provision is void
20 as it violates Ariz. Rev. Stat. § 20-115, which states that "no policy delivered or issued
21 for delivery in this state" and covering a subject located in the state shall be subject to a
22 condition requiring the application of the law of any other state. Ariz. Rev. Stat. § 20-
23 115(A). Here, the policy was delivered and issued to CIBA in California. In the
24 alternative, were this section to void the choice of law provision, the statute specifies that
25 "such voidance shall not affect the validity of the other provisions of the policy." Ariz.

26
27 ¹ Further, Plaintiffs may be estopped from arguing that they did not agree to the
28 arbitration clause while seeking to enforce the Ironshore policy. *Mundi v. Union Sec. Life
Ins. Co.*, 555 F.3d 1042, 1045–46 (9th Cir. 2009) (discussing when equitable estoppel
may "preclude[] a party from claiming the benefits of a contract while simultaneously
attempting to avoid the burdens that contract imposes") (citations omitted).

1 Rev. Stat. § 20-115(B). Thus, it would not impact the validity of the arbitration clause.

2 Additionally, Plaintiffs contend that enforcement of the choice of law and
3 arbitration clauses would violate their reasonable expectations. The doctrine of
4 reasonable expectations can bar enforcement of a term in a standardized insurance
5 contract in a limited set of circumstances. *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz.
6 266, 272, 742 P.2d 277, 283 (1987). First, the doctrine may apply “[w]here the contract
7 terms, although not ambiguous to the court, cannot be understood by the reasonably
8 intelligent consumer who might check on his or her rights.” *Id.* Here, Plaintiffs do not
9 allege that the relevant contract terms are ambiguous. Second, the doctrine may apply
10 “[w]here the insured did not receive full and adequate notice of the term in question, and
11 the provision is either unusual or unexpected, or one that emasculates apparent
12 coverage.” *Id.* at 372. While Plaintiffs do allege that they did not receive full notice of the
13 terms, that assertion is rejected for the reasons set forth above. Further they do not
14 provide facts or authority to suggest that the provisions are unusual or significantly alter
15 coverage. Finally, reasonable expectations may apply when some activity that is
16 reasonably attributable to the insurer “would create an objective impression of coverage
17 in the mind of a reasonable insured” or “has induced a particular insured reasonably to
18 believe that he has coverage, although such coverage is expressly and unambiguously
19 denied by the policy.” *Id.* at 373. Plaintiffs allege no such activity. Therefore, the Court
20 finds that the reasonable expectations doctrine does not bar enforcement of the choice of
21 law and arbitration clauses.

22 **III. Whether the Clause is Unconscionable**

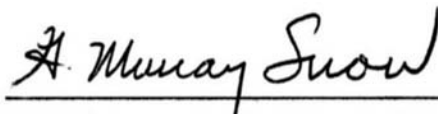
23 Lastly, Plaintiffs seem to allege that enforcement of the clause would be
24 unconscionable. They state that “compelling Plaintiffs to arbitrate this matter in London,
25 England would cause severe financial harm and be unduly oppressive.” (Doc. 66 at 9.)
26 Plaintiffs also filed an affidavit from their President Pat Simone, which states that “[i]f
27 [Plaintiffs] were required to arbitrate their claims against Ironshore in London, England it
28 would cause severe financial harm.” (Doc. 67 ¶ 19.) When “a party seeks to invalidate an

1 arbitration agreement on the ground that arbitration would be prohibitively expensive,
2 that party bears the burden of showing the likelihood of incurring such costs.” *Green*
3 *Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 92 (2000). Here, Plaintiffs provide
4 no such evidence, and instead offer only the conclusory statement that arbitration in
5 England would be prohibitively expensive. This is insufficient to bar enforcement of the
6 clause. Therefore,

7 **IT IS ORDERED** that Defendant Ironshore’s Motion to Compel Arbitration and
8 Stay Proceedings (Doc. 59) is **granted**.

9 **IT IS FURTHER ORDERED** directing the parties’ to jointly file a status report
10 on or before **May 29, 2014, and every 90 days thereafter**, until the stay is lifted and/or
11 the arbitration proceedings are resolved.

12 Dated this 27th day of February, 2014.

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16 G. Murray Snow
17 United States District Judge
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